

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Implementation of Sections 309(j) and 337 of the)	
Communications Act of 1934 as Amended)	WT Docket No. 99-87
)	
Promotion of Spectrum Efficient Technologies)	RM-9332
on Certain Part 90 Frequencies)	

**PRIVATE WIRELESS MINING COALITION OPPOSITION
TO THE PETITION FOR RECONSIDERATION OF
THE AMERICAN MOBILE TELECOMMUNICATIONS ASSOCIATION, ET AL.**

Respectfully submitted,

**THE PRIVATE WIRELESS MINING
COALITION**

Alan G. Fishel
Jeffrey E. Rummel
ARENT FOX KINTNER PLOTKIN &
KAHN, PLLC
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5339
(202) 857-6450
(202) 715-8479

Its Attorneys

Dated: September 25, 2003

TABLE OF CONTENTS

Table of Contents.....	i
Summary.....	ii
I. The Commission Should Not Reconsider Its Mandatory 12.5 kHz Conversion Date Of January 1, 2013 For 25 kHz Facilities Located Solely In Rural Areas	2
A. The Goal Of This Proceeding Is To Reduce Congestion In The Affected Bands While Accounting For The Needs Of 25 kHz Licensees	2
B. Spectrum Congestion Concerns Focus On Urban Areas And Not Rural Areas, And Accordingly There Is Certainly No Reason to Accelerate the Mandatory Conversion Date In Rural Areas	3
C. Accelerating The 12.5 kHz Conversion In Rural Areas Will Create Safety And Environmental Risks, Unnecessarily And Substantially Disrupt The Operations Of Rural Area Licensees, and Cause Such Licensees Tremendous Economic Harm	7
1. The Evidence Presented in the Coalition Petition	7
2. The Petitioners' Filings In Response To The Second Further Notice of Proposed Rulemaking	8
D. The Pendency Of This Proceeding Cannot Justify Subjecting 25 kHz Rural Area Licensees To New, Unnecessary Narrowband Migration Obligations	10
II. The Petition For Reconsideration Should Be Denied As It Would Apply To Urban Area Facilities	13
A. The Policies Underlying This Proceeding Do Not Require An Accelerated 12.5 kHz Conversion for Urban Area Facilities Where Consent Is Obtained From All Stations That Could Be Subjected To Objectionable Interference	14
B. For Urban Area Licensees That Do Not Obtain The Consent Of Affected Entities, The Relief Requested By Petitioners Could Unnecessarily Prevent Such Licensees From Converting Directly To 6.25 kHz Technology	15
Conclusion	16

SUMMARY

The Private Wireless Mining Coalition (the “Coalition”) hereby submits this Opposition to the “Petition for Reconsideration” filed with the Commission on August 18, 2003 by the American Mobile Telecommunications Association (“AMTA”), the Industrial Telecommunications Association, Inc. (“ITA”) and PCIA (collectively, “Petitioners”).

In the *Second Report and Order* in this proceeding, the Commission imposed a deadline of January 1, 2013 (*i.e.*, the end of 2012) for mandatory migration to 12.5 kHz technology for non-public safety entities operating on private land mobile radio service (“PLMRS”) frequencies in the 150-174 MHz and 421-512 MHz bands (the “Affected Bands”). In their Petition for Reconsideration, Petitioners requested that the mandatory deadline be accelerated by five years to January 1, 2008 (*i.e.*, the end of 2007). As demonstrated in this Opposition, the relief requested by Petitioners is not consistent with the public interest and should therefore be denied by the Commission.

The relief requested by Petitioners broadly applies not only to facilities located in urban areas where spectrum congestion is a significant concern, but also to facilities in rural areas where congestion is not a significant concern. As demonstrated in the Opposition, for 25 kHz facilities located solely in rural areas, Petitioners’ request should be denied. The record in this proceeding demonstrates indisputably that the goal of this proceeding is to reduce congestion in the Affected Bands while also accounting for the needs of 25 kHz incumbents. Congestion and interference concerns are predominant in urban areas, not in rural areas. AMTA’s and ITA’s filings in this proceeding acknowledge that this is the case. Accordingly, to accelerate the mandatory 12.5 kHz conversion date by *five years in rural areas (to the end of 2007)*, as Petitioners have requested, would unquestionably be erroneous and against the public interest.

To put this in perspective, AMTA, whose Petition for Rulemaking resulted in the 2000 *Further Notice of Proposed Rulemaking* in this proceeding, initially recommended in this proceeding that the Commission require rural area licensees to convert to 12.5 kHz technology by December 31, 2020. In the Second R&O, the Commission accelerated that date by eight (8) full years and mandated that rural area licensees convert by the end of 2012. Thus, to put it mildly, the Commission gave AMTA far more than it even initially asked for with respect to rural area systems. Yet, AMTA and the other Petitioners are now asking for even more aggressive relief with regard to rural area systems. Specifically, Petitioners are now requesting that the mandatory 12.5 kHz conversion date be accelerated even further, *by another five years*, such that the date for mandatory conversion for even rural area licensees would be the end of 2007, which is *thirteen (13) full years prior to the date initially recommended by AMTA*. The Commission should deny their request.

Since AMTA’s request for a December 31, 2020 conversion date for rural area systems, there have been no new facts or circumstances that warrant an acceleration of such date by thirteen years. Moreover, if congestion in rural areas *was* a major problem (and warranted acceleration of the ultimate mandatory conversion date to the end of 2007), AMTA would *never* have initially recommended a date of December 31, 2020 for a conversion to 12.5 kHz technology in such areas. In fact, the *seventeen* year difference in AMTA’s initial proposal

between the proposed conversion date for the top 50 urban markets (December 31, 2003) and the proposed conversion date for rural areas (December 31, 2020) highlights AMTA's recognition of the significant differences in the level of congestion occurring in urban and rural areas. In short, even Petitioners' own statements belie their position.

Moreover, such is also the case with respect to the comments filed by Petitioners and others in response to the *Second Further Notice of Proposed Rulemaking*. These comments further demonstrate that an accelerated conversion date for rural areas is unwarranted. In response to the *Second Further Notice of Proposed Rulemaking*, Petitioners, as well as other commenters, have recommended that the Commission forbear at this time from establishing a future date for mandatory migration for 6.25 kHz technology. Such forbearance would, of course, include even urban areas with significant congestion and interference concerns. Thus, Petitioners as well as many others collectively agree that spectrum congestion concerns in urban areas are not significant enough to warrant the adoption, at this time, of a future date for mandatory conversion to 6.25 kHz technology. But if it is unnecessary and not in the public interest at this time to establish a future date for conversion to 6.25 kHz technology even in urban areas where the congestion is occurring, it is probably not necessary or in the public interest at this time to establish any date for conversion to 12.5 kHz in rural areas -- where the congestion is not occurring -- **and it is certainly unnecessary and not in the public interest to accelerate that date in rural areas to the end of 2007.**

The evidence presented by the Coalition in its previously-filed "Petition For Reconsideration demonstrates that Petitioners' request to substantially accelerate the 12.5 kHz conversion in rural areas will create safety and environmental risks, unnecessarily and substantially disrupt company operations, and cause rural area licensees tremendous economic harm. In addition, although Petitioners claim in their Petition for Reconsideration that substantially accelerating the mandatory conversion would not burden licensees, their individual filings in response to the *Second Further Notice of Proposed Rulemaking* are inconsistent with such claim.

Petitioners have concluded that a significant acceleration of the 12.5 kHz conversion date is appropriate for *all* licensees operating in the Affected Bands regardless of congestion concerns, and that any burden imposed on licensees still operating 25 kHz systems is only for those "recalcitrant PLMRS users" who "elected to ignore [the] warnings" and who "have proven unwilling...to plan for system upgrades." As demonstrated in the Opposition, this argument is erroneous and contrary to applicable law.

Finally, the Petition for Reconsideration should be denied as it would apply to urban area facilities. If granted by the Commission, not only would the Petition For Reconsideration accelerate the 12.5 kHz conversion deadline for rural area licensees, it would similarly require all urban area licensees to complete their migration to 12.5 kHz technology by the end of 2007. For the reasons set forth herein, such accelerated conversions are contrary to the public interest for those urban area 25 kHz facilities that are consented to by co-channel and adjacent channel licensees that could be subject to objectionable interference, as well as for those 25 kHz urban area facilities for which consent is not obtained from affected co-channel and adjacent channel licensees.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Implementation of Sections 309(j) and 337 of the)	
Communications Act of 1934 as Amended)	WT Docket No. 99-87
)	
Promotion of Spectrum Efficient Technologies)	RM-9332
on Certain Part 90 Frequencies)	

**PRIVATE WIRELESS MINING COALITION OPPOSITION
TO THE PETITION FOR RECONSIDERATION OF
THE AMERICAN MOBILE TELECOMMUNICATIONS ASSOCIATION, ET AL.**

The Private Wireless Mining Coalition (the “Coalition”), by its attorneys and pursuant to 47 C.F.R. §1.429(f), hereby submits this Opposition to the “Petition for Reconsideration” filed with the Commission on August 18, 2003 by the American Mobile Telecommunications Association (“AMTA”), the Industrial Telecommunications Association, Inc. (“ITA”) and PCIA (collectively, “Petitioners”).

In the *Second Report and Order* in this proceeding,¹ the Commission imposed a deadline of January 1, 2013 (*i.e.*, the end of 2012) for mandatory migration to 12.5 kHz technology for non-public safety entities operating on private land mobile radio service (“PLMRS”) frequencies in the 150-174 MHz and 421-512 MHz bands (the “Affected Bands”). In their Petition for Reconsideration, Petitioners requested that the mandatory deadline be accelerated by five years to January 1, 2008 (*i.e.*, the end of 2007). As demonstrated herein, the relief requested by Petitioners is not consistent with the public interest and should therefore be denied by the Commission. In support of this Opposition, the Coalition² states as follows:

¹ “Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended; Promotion of Spectrum Efficient Technologies on Certain Part 90 Frequencies”, Second Report and Order And Second Further Notice Of Proposed Rule Making, WT Docket No. 99-87, RM-9332, FCC 03-34 (rel. February 25, 2003) (“Second R&O”).

² As the Commission is aware, the Members of the Coalition (Phelps Dodge Corporation, Barrick

I. The Commission Should Not Reconsider Its Mandatory 12.5 kHz Conversion Date Of January 1, 2013 For 25 kHz Facilities Located Solely In Rural Areas

The mandatory 12.5 kHz conversion date, imposed by the Commission in the Second R&O, is January 1, 2013. Because Petitioners have requested that the mandatory deadline be accelerated by five years to January 1, 2008 for *all* 25 kHz licensees operating in the Affected Bands, the relief requested by Petitioners broadly applies not only to facilities located in urban areas where spectrum congestion is a significant concern, but also to facilities in rural areas where congestion is not a significant concern.³ As demonstrated herein, for 25 kHz facilities located solely in rural areas, Petitioners' request should be denied.

A. The Goal Of This Proceeding Is To Reduce Congestion In The Affected Bands While Accounting For The Needs Of 25 kHz Licensees

The Commission may only adopt regulations affecting licensees in the Affected Bands if such regulations are necessary and in the public interest.⁴ The record in this proceeding demonstrates indisputably that the goal of this proceeding is to reduce congestion in the Affected

Goldstrike and BHP Billiton, New Mexico Coal) are affiliated with some of the largest mining companies in the world, each of which is licensed to operate PLMRS facilities in the Affected Bands. Collectively, the Coalition Members hold more than 250 Commission licenses in the Affected Bands that authorize the operation of more than 6,000 radio units, including base stations, repeaters, mobiles and portables. Several thousand of these units are units operating at one voice path per 25 kHz of spectrum.

³ In the Petition For Reconsideration filed by the Coalition on August 18, 2003 with respect to the Second R&O (the "Coalition Petition"), the Coalition explained that for the purposes of the Coalition Petition proposed 25 kHz facilities in the Affected Bands should be deemed to be located in a "Rural Area" if both of the following are true: (i) the area of operation of the proposed facilities does not overlap a circle with a radius of 113 km (70 mil.) from the geographic coordinates specified for the urban areas listed in 47 C.F.R. §90.741 ("70 Mile Urban Area Contours"); and (ii) the service area contour of the proposed facilities also does not overlap any 70 Mile Urban Area Contours. See Coalition Petition, p. 4. Urban Areas, therefore, for the purposes of the Coalition Petition were defined to be areas located outside a circle with a radius of 113 km (70 mil.) from the geographic coordinates specified for the urban areas listed in 47 C.F.R. §90.741. Id. The Commission, of course, has not yet ruled on the Coalition Petition. Accordingly, the Coalition refers generically to "rural areas" and "urban areas" in this Opposition.

⁴ See 47 C.F.R. §1.425.

Bands while also accounting for the needs of 25 kHz incumbents.⁵ In fact, in their Petition for Reconsideration, Petitioners confirm that the key issue in this proceeding is “whether the continued use of 25 kHz equipment...precludes the deployment of more advanced, efficient technologies by other users in the area.”⁶ In rural areas, the answer to that question is no, and the Commission should not accelerate the ultimate conversion date in rural areas.

B. Spectrum Congestion Concerns Focus On Urban Areas And Not Rural Areas, And Accordingly There Is Certainly No Reason to Accelerate the Mandatory Conversion Date In Rural Areas

As the record in this proceeding unquestionably demonstrates, congestion and interference concerns focus primarily on urban areas and not rural areas. The reason for this is simple: congestion and interference concerns are predominant in urban areas, not in rural areas.

In fact, Petitioners acknowledge that this is the case. In AMTA’s Petition for Rulemaking that resulted in the 2000 *Further Notice of Proposed Rulemaking* in this proceeding, AMTA proposed a tiered conversion to 12.5 kHz technology, with the top 50 urban area markets subject to the first accelerated mandatory conversion deadline of December 31, 2003.⁷ In presenting this proposal, AMTA explained that its market-based approach, which focused on early conversion in urban areas, was intended to “recognize the differences in spectrum demands between urban and rural areas.”⁸ In AMTA’s Comments supporting its proposal, AMTA stated that adoption of an early date certain for the 12.5 kHz migration was appropriate to accomplish the migration for “licensees in markets with traditionally inadequate spectrum resources”, *i.e.*, urban markets.⁹ Further, in its 2001 Reply Comments, AMTA stated that its proposal for a

⁵ See e.g., Second R&O at ¶24.

⁶ Petition for Reconsideration at n.22.

⁷ See AMTA Petition For Rulemaking filed June 19, 1998.

⁸ Id. at 2.

⁹ AMTA Comments, p.5 (filed March 5, 2001). Unless otherwise specified, any comments or reply comments identified in this Opposition have been filed in WT Docket No. 99-87.

market-based approach to a 12.5 kHz migration was necessary to address “existing or incipient spectrum shortages [that] demand more efficient use of available allocations.”¹⁰

Accordingly, the Commission’s requirement that rural area systems convert by the end of 2012 to 12.5 kHz technology is arguably improper because the reason for the proceeding -- congestion -- is not a significant concern in rural areas. But in any event, to accelerate that date by *five years in rural areas (to the end of 2007)*, as Petitioners have requested, would unquestionably be erroneous and against the public interest.¹¹

To put this in perspective, AMTA, whose Petition for Rulemaking resulted in the 2000 *Further Notice of Proposed Rulemaking* in this proceeding, initially recommended in this proceeding that the Commission require rural area licensees to convert to 12.5 kHz technology by December 31, 2020.¹² In the Second R&O, the Commission accelerated that date by eight (8) full years and mandated that rural area licensees convert by the end of 2012. Thus, to put it mildly, the Commission gave AMTA far more than it even initially asked for with respect to rural area systems. Yet, AMTA and the other Petitioners are now asking for even more aggressive relief with regard to rural area systems. Specifically, Petitioners are now requesting that the mandatory 12.5 kHz conversion date be accelerated even further, *by another five years*, such that the date for mandatory conversion for even rural area licensees would be the end of 2007, which is *thirteen (13) full years prior to the date initially recommended by AMTA*. The Commission should deny their request.

¹⁰ AMTA Reply Comments, n.10 (filed April 2, 2001). In this proceeding, ITA initially recommended a market-based approach. See ITA’s Comments, p. 4 (filed March 5, 2001). While ITA ultimately revised its proposal, ITA has never disavowed its statement that the top urban markets “have the most immediate need for narrowband technology.” Id. at 5.

¹¹ Although the Coalition believes that imposing any mandatory 12.5 kHz conversion date on rural area licensees may very well be unnecessary, the Coalition’s proposal in the Coalition Petition does not request elimination of the Commission’s ultimate 12.5 kHz conversion date of January 1, 2013, so long as the interim licensing restrictions adopted by the Commission in the Second R&O are not retained.

Since AMTA's request for a December 31, 2020 conversion date for rural area systems, there have been no new facts or circumstances that warrant an acceleration of such date by thirteen years. Moreover, if congestion in rural areas *was* a major problem (and warranted acceleration of the ultimate mandatory conversion date to the end of 2007), AMTA would *never* have initially recommended a date of December 31, 2020 for a conversion to 12.5 kHz technology in such areas. In fact, the *seventeen* year difference in AMTA's initial proposal between the proposed conversion date for the top 50 urban markets (December 31, 2003) and the proposed conversion date for rural areas (December 31, 2020) highlights AMTA's recognition of the significant differences in the level of congestion occurring in urban and rural areas. In short, even Petitioners' own statements belie their position.

Moreover, such is also the case with respect to the comments filed by Petitioners and others in response to the *Second Further Notice of Proposed Rulemaking*. These comments further demonstrate that an accelerated conversion date for rural areas is unwarranted.

In response to the *Second Further Notice of Proposed Rulemaking*, Petitioners, as well as other commenters, have recommended that the Commission forbear at this time from establishing a future date for mandatory migration for 6.25 kHz technology. ITA, for example, claims that it "would be entirely premature and unwarranted" to mandate a date for conversion to 6.25 kHz technology at this time.¹³ Such forbearance would, of course, include even urban areas with significant congestion and interference concerns. Thus, Petitioners as well as many others collectively agree that spectrum congestion concerns in urban areas are not significant enough to warrant the adoption, at this time, of a future date for mandatory conversion to 6.25 kHz technology.

¹² See AMTA Petition for Rulemaking, p.6.

¹³ ITA Comments, p.3-4 (filed September 15, 2003)(quoting MRFAC's March 5, 2001 Comments).

But if it is unnecessary and not in the public interest at this time to establish a future date for conversion to 6.25 kHz technology even in urban areas where the congestion is occurring, it is probably not necessary or in the public interest at this time to establish any date for conversion to 12.5 kHz in rural areas -- where the congestion is not occurring -- **and it is certainly unnecessary and not in the public interest to accelerate that date in rural areas to the end of 2007.** Simply put, if congestion in urban areas is not significant enough to warrant setting a future date for conversion to 6.25 kHz technology in those areas at this time, the Commission arguably should not have even set a date for conversion to 12.5 kHz in rural areas -- which do not have the same congestion concerns, and the Commission certainly should not accelerate that date in rural areas.

In sum, as the record in this proceeding reflects, as AMTA's initial recommendation of December 31, 2020 for conversion of Rural Area systems shows, and as the comments in response to the *Second Further Notice of Proposed Rulemaking* support, the concerns regarding congestion focus on urban areas and there is no "congestion-based" justification for requiring that rural area licensees convert in the near future. Accordingly, to accelerate the 12.5 kHz conversion date for rural area licensees is simply not justified or in the public interest. Based on the facts discussed above alone, the Commission should reject Petitioners' recommendation to accelerate the mandatory migration date for rural area systems. Moreover, as discussed below, there are even more reasons why the Commission should refuse to accelerate the date for mandatory migration for rural area systems.

C. Accelerating The 12.5 kHz Conversion In Rural Areas Will Create Safety And Environmental Risks, Unnecessarily And Substantially Disrupt The Operations Of Rural Area Licensees, and Cause Such Licensees Tremendous Economic Harm

As set forth below, the evidence presented by the Coalition in the Coalition Petition demonstrates that Petitioners' request to substantially accelerate the 12.5 kHz conversion in rural areas will create safety and environmental risks, unnecessarily and substantially disrupt company operations, and cause rural area licensees tremendous economic harm. In addition, although Petitioners claim in the Petition for Reconsideration that substantially accelerating the mandatory conversion would not burden licensees, their individual filings in response to the *Second Further Notice of Proposed Rulemaking* are inconsistent with such claim.

1. The Evidence Presented in the Coalition Petition

The Coalition demonstrated in the Coalition Petition that, for rural area systems, there are no compelling public interest benefits supporting the prohibition of new and expansion applications prior to the January 1, 2013 mandatory migration date.¹⁴ The Coalition further demonstrated that for rural area systems, prohibiting the filing of new and expansion 25 kHz applications prior to the January 1, 2013 mandatory migration date will create safety and environmental risks and unnecessarily and substantially disrupt company operations.¹⁵ For the same reasons, of course, accelerating the ultimate 12.5 kHz conversion date as proposed by Petitioners will also create safety and environmental risks and unnecessarily and substantially disrupt company operations for licensees located in rural areas.

In addition, the Coalition demonstrated in the Coalition Petition that prohibiting the filing of new and expansion 25 kHz applications prior to the January 1, 2013 mandatory migration date will unnecessarily cause licensees in rural areas such as the Coalition Members tremendous

¹⁴ Coalition Petition at 4-7.

¹⁵ Id. at 7-18.

economic harm.¹⁶ Once again, for the same reasons, accelerating the ultimate conversion date in rural areas will also cause the Coalition Members tremendous economic harm.

Petitioners' filings do not, and indeed cannot, rebut any of the compelling reasons set forth in the Coalition Petition that demonstrate that (i) the January 1, 2013 12.5 kHz conversion deadline in rural areas is, if anything, too early -- and certainly not too late; and (ii) accelerating the 12.5 kHz conversion in rural areas will create safety and environmental risks, unnecessarily and substantially disrupt the operations of rural area licensees, and cause such licensees tremendous economic harm. In fact, as discussed in this Opposition, many of the statements made by Petitioners in this proceeding weigh against granting their Petition for Reconsideration.

2. **The Petitioners' Filings In Response To The Second Further Notice of Proposed Rulemaking**

As discussed above, the facts cited by the Coalition in the Coalition Petition disprove Petitioners' claim in their Petition for Reconsideration that their proposed accelerated 12.5 kHz conversions will not create a financial hardship nor cause significant disruptions. Moreover, Petitioners themselves admit that problems are going to occur during conversions to narrowband technology and they further acknowledge that substantial financial and labor resources will be expended in connection with such conversions.

In ITA's recent comments to the Commission in response to the *Second Further Notice of Proposed Rulemaking*, for example, ITA requests that the Commission forbear from imposing any dates for a 6.25 kHz migration because "knowledge gained from managing and overcoming problems in the 12.5 kHz migration would serve as a valuable blueprint for how or how not to proceed with the 6.25 kHz migration."¹⁷ In addition, ITA freely acknowledges that the conversions will require significant financial and labor resources to perform, in fact, so

¹⁶ *Id.* at 19-21.

¹⁷ *ITA Comments* at 4 (filed September 15, 2003) (emphasis added).

significant that they may not be performed at all if a date certain for 6.25 kHz technology is mandated. As ITA states, “ITA is concerned that licensees will not allocate the financial or labor resources necessary to upgrade or update equipment associated with the 12.5 kHz migration, knowing full-well that the Commission is creating a date-certain for a second migration to 6.25 kHz technologies.”¹⁸

A further example of Petitioners downplaying the difficulty, disruption and expense of narrowband conversions in their Petition for Reconsideration but then more accurately discussing the impact of such conversions in their subsequent comments to the *Second Further Notice of Proposed Rulemaking* is as follows:

- In the Petition for Reconsideration, Petitioners state:

“Many PLMR entities had begun incorporating the cost of system migration to narrowband operations into their business plans years ago.... While there inevitably are some entities that have elected to ignore these warnings...the vast majority of licensees are well-prepared and do not need another ten years to complete the conversion process....[P]reparation for the conversion to narrowband operations has been occurring for years by all but the most recalcitrant PLMR users. Contrary to the FCC’s expectation, the majority of non-public safety users will be able to convert their dual mode equipment with minimal effort or cost or should be at a point where their equipment is ready to be replaced.” Petition for Reconsideration at 7-9.

Thus, in the Petition for Reconsideration, Petitioners are seeking to leave the Commission with the impression that virtually every licensee operating in the Affected Bands is ready to convert, that it will cost very little, and there are only a few companies that are not ready.

- In contrast, in AMTA’s comments to the *Second Further Notice of Proposed Rulemaking*, AMTA recognized that:

“[T]he industry only recently has begun to deploy 12.5 kHz bandwidth technologies and it will take some time for that migration process to be completed, even under the Association’s recommended accelerated deadline.” AMTA’s Comments at 2 (filed September 15, 2003).

Moreover, and in even more direct contrast, as discussed above, ITA acknowledged that the conversions will require significant financial and labor resources to perform, in fact,

¹⁸ Id. (emphasis added).

so significant that they may not be performed at all if a date certain for 6.25 kHz technology is mandated. ITA Comments at 4 (filed September 15, 2003).

In addition, Petitioners also claim in the Petition for Reconsideration that any single-mode 25 kHz equipment has been fully depreciated and, therefore, it is reasonable for the Commission to mandate that such equipment be replaced on an accelerated schedule. However, as the Petitioners and equipment manufacturers acknowledge, such equipment often can be effectively utilized for 20 years or more, well past the date such equipment has been depreciated for accounting purposes.¹⁹ Therefore, in rural areas where congestion and interference are not significant concerns, there is no reason for companies operating 25 kHz systems to be forced to dispose of perfectly usable equipment well before its useful life is over. In these difficult economic times when corporations are seeking to forego incurring unnecessary expenses, it is contrary to the public interest to require such corporations in rural areas, where congestion and interference are not significant concerns, to dispose of perfectly usable equipment while also requiring them to purchase new equipment for hundreds of thousands, or even millions, of dollars, many, many years before such disposal is necessary. Yet, that result is what Petitioners are seeking to achieve by requesting a substantial acceleration of the ultimate 12.5 kHz conversion date by five years even for rural area systems.

D. The Pendency Of This Proceeding Cannot Justify Subjecting 25 kHz Rural Area Licensees To New, Unnecessary Narrowband Migration Obligations

In their Petition for Reconsideration, Petitioners allege that the vast majority of licensees are either well-prepared to convert from 25 kHz to 12.5 kHz technology, or should be deemed to be prepared for such conversion because of the Commission's "well-advertised

¹⁹ See Ex Parte Letter of AMTA, p. 5 (dated August 27, 2002) ("it is not uncommon for licensees to use equipment that is 20 or even 30 years old."); See Petition For Reconsideration And Clarification of Motorola, Inc., p. 6 (filed August 18, 2003) ("a base station's useful operational life can long exceed any reasonable amortization schedule".)

[refarming] initiative.”²⁰ Thus, Petitioners conclude that a significant acceleration of the 12.5 kHz conversion date is appropriate for *all* licensees operating in the Affected Bands regardless of congestion concerns, and that any burden imposed on licensees still operating 25 kHz systems is only for those “recalcitrant PLMRS users” who “elected to ignore [the] warnings” and who “have proven unwilling...to plan for system upgrades.”²¹ As shown in the prior sections, Petitioners’ argument about the burden is not only erroneous as demonstrated by the Coalition’s Petition, but it is not even consistent with Petitioners’ own filings in this proceeding. Moreover, as to rural area licensees, for all of the reasons set forth in the prior sections of this Opposition, Petitioners’ argument fails. For example, even if 25 kHz licensees were found to have had fair and adequate notice that mandatory migration deadlines were to be imposed (instead of that the Commission might impose such deadlines) such would not justify accelerating any of these deadlines for rural area systems because, among other things, the public interest does not require accelerated conversion schedules in areas where there are no significant congestion or interference concerns. That is, any argument by Petitioners that the Commission should impose a rule that is contrary to the public interest simply because fair and adequate notice has purportedly been given that the rule may be imposed should be flatly rejected.

Moreover, even without consideration of any of the prior sections of this Opposition, Petitioners’ argument regarding adequate notice has no merit as it is also contrary to existing Commission regulations and applicable administrative law. As an initial matter, Petitioners have mischaracterized the nature of the Commission’s refarming rules that have been applicable to 25 kHz licensees throughout this proceeding, and they have conveniently ignored the well-settled requirements of the Administrative Procedure Act (“APA”). Specifically, licensees in the Affected Bands that are currently operating single-mode 25 kHz systems are – and have been

²⁰ Petition for Reconsideration at 9.

throughout this proceeding – in full compliance with Commission requirements. In 1995, the Commission concluded that the type certification process was preferable to mandating 12.5 kHz conversion dates and licensees were therefore permitted to continue to operate their 25 kHz systems.²² Indeed, the Commission confirmed in the Second R&O that until the issuance of that order the Commission’s rules did “*not require users to replace existing systems.*”²³ Thus, while it is true that 12.5 kHz-capable equipment has been available to the industry for some time, 25 kHz licensees such as the Coalition Members have been under no legal obligation to convert their entire systems to 12.5 kHz technology and it is inappropriate for Petitioners to characterize the continued operation of 25 kHz systems as a result of “recalcitrance”.²⁴

Further, Petitioners’ attempt to justify the adoption of a substantial five year acceleration of the 12.5 kHz conversion date based on “warnings”, and a “well-advertised...initiative” that has been pending for many years, simply ignores the fact that under the APA and the Commission’s rules licensees are under no obligation to comply with proposed rules until (i) the Commission has determined that such rules are in fact in the public interest; (ii) the Commission has issued an order confirming such conclusion; and (iii) such rules become effective.²⁵ Contrary to Petitioners’ contention, 25 kHz licensees such as the Coalition Members have had no

²¹ *Id.* at 8-9.

²² See Second R&O at ¶7.

²³ *Id.*

²⁴ It should be noted that many of the industries utilizing 25 kHz systems in the Affected Bands, including the mining industry, are highly regulated in a multitude of areas. The mining industry, for example, is regulated on the federal level not only by the Mine Safety and Health Act (“MSHA”), 30 C.F.R. §§ 1-199, but also by numerous environmental statutes including but not limited to the following: *National Environmental Policy Act*, 42 U.S.C. § 4321 *et seq.*; *National Historic Preservation Act*, 16 U.S.C. § 470 *et seq.*; *Indian Mineral Leasing Act of 1938*, 25 U.S.C. § 396a *et seq.*; *Surface Mining Control Reclamation Act*, 30 U.S.C. § 1201 *et seq.*; *Endangered Species Act*, 16 U.S.C. §§ 460l-9, 460k-1, 668dd, 715i, 715a, 1362, 1371, 1372, 1402, 1531 – 1543; *Comprehensive Environmental Response, Compensation and Liability Act*, 42 U.S.C. § 9601 *et seq.*; *Resource Conservation and Recovery Act*, 42 U.S.C. § 6901 *et seq.*; *Clean Water Act*, 33 U.S.C. § 1251 *et seq.* Accordingly, the characterization of 25 kHz licensees as unwilling or reluctant to submit to federal regulation does not comport with reality.

obligation to convert their systems just because the applicable regulations were subject to a rulemaking notice and PLMR users have “enjoyed access” to 12.5 kHz capability for over six years.²⁶ Rather, it was *only* upon the release of the Second R&O in February 2003 that such licensees *first became* subject to a Commission decision to impose a mandatory 12.5 kHz conversion. Accordingly, Petitioners’ claim that the 12.5 kHz conversion date should be substantially accelerated because 25 kHz licensees have purportedly had for more than six years “full knowledge of the upcoming narrowband requirement”²⁷ should be rejected as erroneous and incorrect for the additional reason that the mandatory conversion requirement has not in fact been in place for such period of time.

Finally, as to rural area licensees in particular, such as the Coalition Members, because there are no significant congestion and interference concerns in rural areas and such areas therefore do not fall under the Commission’s policy objectives in this proceeding, rural area licensees operating 25 kHz systems reasonably did not anticipate that the Commission would require converting their rural area systems to 12.5 kHz technology at any time in the near future.

II. The Petition For Reconsideration Should Be Denied As It Would Apply To Urban Area Facilities

If granted by the Commission, not only would the Petition For Reconsideration accelerate the 12.5 kHz conversion deadline for rural area licensees, it would similarly require all urban area licensees to complete their migration to 12.5 kHz technology by the end of 2007.

Thus, even those urban area 25 kHz facilities that are consented to by co-channel and adjacent channel licensees that could be subject to objectionable interference would be subject to the accelerated deadline proposed by the Petitioners, which is a full five years ahead of the ultimate mandatory migration date imposed by the Commission for such urban area facilities.

²⁵ See 5 U.S.C. §553; 47 C.F.R. §§1.425, 1.427.

²⁶ Petition for Reconsideration at 8.

Accordingly, for the reasons set forth in the Coalition Petition and below, the Coalition submits that with respect to such urban area facilities where consent is obtained, the Petition For Reconsideration should be denied.

As to those 25 kHz urban area facilities for which consent is not obtained from affected co-channel and adjacent channel licensees, the Petition For Reconsideration should be denied because it is against the public interest to impose accelerated licensing restrictions on such facilities that could prevent licensees of such facilities from converting directly to 6.25 kHz technology, and therefore could subject such licensees to extremely onerous double conversions.

A. The Policies Underlying This Proceeding Do Not Require An Accelerated 12.5 kHz Conversion for Urban Area Facilities Where Consent Is Obtained From All Stations That Could Be Subjected To Objectionable Interference

Because the Commission's narrowband migration requirements are aimed at ensuring the efficient use of shared spectrum and protecting the operations of co-channel and adjacent channel licensees that could be subject to objectionable interference, where consent is obtained from all stations that could be subjected to objectionable interference from proposed 25 kHz facilities, the Coalition demonstrated in the Coalition Petition that it is in the public interest to permit applicants in urban areas to obtain and use 25 kHz technology without restriction until January 1, 2013, which is the ultimate 12.5 kHz conversion date adopted by the Commission in the Second R&O.²⁸

In light of the record before the Commission, it is similarly contrary to the public interest to require urban area licensees that obtain the consent of co-channel and adjacent channel licensees to cease operation of their 25 kHz systems a full five years prior to the Commission's ultimate 12.5 kHz conversion date of January 1, 2013, as Petitioners have requested.

²⁷ Petition for Reconsideration at 11.

²⁸ See Coalition Petition at 21.

B. For Urban Area Licensees That Do Not Obtain The Consent Of Affected Entities, The Relief Requested By Petitioners Could Unnecessarily Prevent Such Licensees From Converting Directly To 6.25 kHz Technology

In the Coalition Petition, the Coalition demonstrated that - as to those 25 kHz licensees operating in urban areas who do not obtain the consent of affected co-channel and adjacent channel licensees – the public interest requires that such licensees not be restricted from continuing to operate or expand their 25 kHz systems until they have an opportunity to convert directly to 6.25 kHz technology after such equipment becomes commercially and readily available.²⁹

In light of the fact that (i) Petitioners' request would require these urban area licensees to move off of 25 kHz equipment as of the end of 2007; and (ii) 6.25 kHz equipment may not be commercially and readily available anywhere near the end of 2007, the accelerated conversion requested in the Petition for Reconsideration could very well unnecessarily require these licensees, including the Coalition Members, to be subjected to two extremely onerous double conversions, each of which in some cases could cost millions of dollars for each system. The Petition for Reconsideration must be denied to avoid this inequitable and unnecessary result.

²⁹ See Coalition Petition at 22.

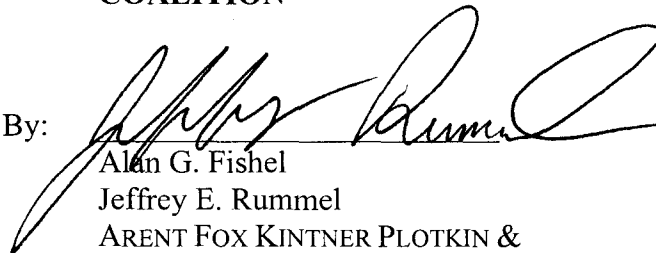
CONCLUSION

For the foregoing reasons, the Coalition Members respectfully request that the Commission deny the Petition for Reconsideration filed by the Petitioners in the above-captioned proceeding.

Respectfully submitted,

**THE PRIVATE WIRELESS MINING
COALITION**

By:



Alan G. Fishel
Jeffrey E. Rummel
ARENT FOX KINTNER PLOTKIN &
KAHN, PLLC
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5339
(202) 857-6450

Its Attorneys

Dated: September 25, 2003

CERTIFICATE OF SERVICE

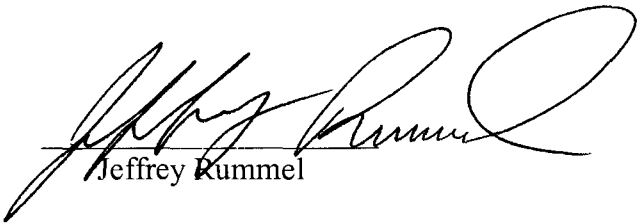
I, Jeffrey Rummel, an attorney in the law firm of Arent, Fox, Kintner, Plotkin & Kahn, PLLC, hereby certify that I have on this 25th day of September, 2003, caused to be sent by First Class United States mail, postage prepaid, copies of the foregoing **“PRIVATE WIRELESS MINING COALITION OPPOSITION TO THE PETITION FOR RECONSIDERATION OF THE AMERICAN MOBILE TELECOMMUNICATIONS ASSOCIATION, ET AL.”**

to the following:

Alan Shark
President and CEO
American Mobile Telecommunications Association, Inc.
200 North Glebe Road, Suite 1000
Arlington, VA 22203

Laura L. Smith
Industrial Telecommunications Association, Inc.
1110 North Glebe Road, Suite 500
Arlington, VA 22201

Jay Kitchen
President and CEO
Personal Communications Industry Association
500 Montgomery Street
Suite 700
Alexandria, VA 22314


Jeffrey Rummel